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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT R. RODRIGUEZ,

Defendant and Appellant.

B202010

(Los Angeles County
Super. Ct. No. BA 322992
concurrent/w BA 303957)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Barbara R. Johnson and Patricia M. Schnegg, Judges. Reversed and remanded with
directions.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E.
Maxwell and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Robert Rodriguez appeals from the judgment following his conviction of one count of selling a controlled substance, methamphetamine. He contends the trial court erred in not instructing the jury *sua sponte* that it must unanimously agree on which of two separate transactions constituted the sale. He also requests that we independently review the record of his *Pitchess* motion to determine whether additional complaints against officers involved in his arrest should have been disclosed. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

We conclude that the court did not err in failing to give the unanimity instruction but that an additional complaint should have been disclosed to Rodriguez.

FACTS AND PROCEEDINGS BELOW

The information charged Rodriguez with two counts of selling a controlled substance on May 17, 2007. The jury heard evidence that Rodriguez may have engaged in three drug sales transactions on that date, two involving Harry Randall and one involving Terry Russell. Although neither count identified the person to whom Rodriguez allegedly sold the drugs, Rodriguez agrees that count 1 referred to Randall and count 2 referred to Russell.

The jury convicted Rodriguez on count 1, the sale to Randall, and acquitted him on count 2, the sale to Russell. Rodriguez filed a timely appeal.

We discuss the facts of the Randall transaction below.

DISCUSSION

I. THE UNANIMITY INSTRUCTION

Detective McNeal testified that he witnessed Rodriguez and Randall engage in two separate transactions at the same location within a 15-minute period. Both transactions followed the same routine. Each time, Randall rode his bicycle to the place where Rodriguez was sitting at a table outside a laundromat. Randall removed his gloves, reached into his right front pocket and removed a small object which he placed inside one of the gloves. He then placed the gloves on the table next to Rodriguez. Rodriguez placed something into one of the gloves on the table. Randall picked up the

gloves, removed something and put it into one of his pockets. Randall then put on his gloves and rode away. The only difference between the two transactions was that in the second transaction Randall put the object he removed from his glove under the seat pad of his bicycle instead of in his pocket.

Rodriguez contends the trial court erred in not instructing the jury sua sponte that it had to agree unanimously which transaction involving Randall constituted the offense charged in count 1.¹ We disagree.

“When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, *either* the prosecution must elect the specific act relied upon to prove the charge to the jury, *or* the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.] The duty to instruct on unanimity when no election has been made rests upon the court sua sponte. [Citation.]” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534; italics added.)

Here the prosecutor made such an election. In closing argument the prosecutor described the first transaction between Rodriguez and Randall then focused the jury’s attention on to the second transaction stating: “Couple minutes, [10] minutes, 15 minutes go by and here comes Mr. Randall again. And this is—this sale—*this transaction, subject [sic] of the first count that you will be asked to decide . . .*” (Italics added.) The prosecutor then proceeded to describe the second transaction between Rodriguez and Randall.

We find the prosecutor’s statement to the jurors, quoted above, sufficiently informed them that the People were relying on the facts of the second transaction to prove the charge in count 1. Therefore, the unanimity instruction was not necessary.

¹ CALCRIM NO. 3500 states: “The defendant is charged with <insert description of alleged offense> [in Count] [sometime during the period of ____to ____]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.”

II. *PITCHESS* MOTION

In response to Rodriguez's *Pitchess* motion the trial court conducted an in camera review of complaints against the officers involved in this case and disclosed one "hit" to the defense. Rodriguez requests that we independently review the sealed record of the materials reviewed by the trial court to determine whether additional information should have been disclosed. We have reviewed the reporter's transcripts of the court's examinations of those records as well as the file on one of the complaints which was not available when the court undertook its initial review (complaint 07-001121). We conclude that the court abused its discretion in not ordering disclosure of complaint 07-001121.

Therefore, we reverse the judgment and remand the matter to the trial court with directions to order the report in complaint 07-001121 disclosed to defense counsel with the requisite protective order. (Evid. Code, § 1045, subd. (e).) The court shall permit Rodriguez an opportunity to demonstrate prejudice and shall order a new trial if there is a reasonable probability that the outcome would have been different had the complaint been disclosed. If, after a reasonable time, Rodriguez has not moved for a new trial or the court finds no reasonable probability of a more favorable outcome if the complaint had been disclosed, the court shall reinstate the judgment.

DISPOSITION

The judgment is reversed and the cause remanded to the trial court to conduct further proceedings as ordered in this opinion.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

DUNNING, J.*

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.